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LEGAL MEMORANDUM

TO: Senate Committee on Ethics
FROM: Office of Legislative Legal Services
DATE: June 25, 2021
SUBJECT: Probable Cause¹

Legal Question

Following receipt of a complaint about Senator Gardner pursuant to Senate Rule 43, the president of the senate and the senate minority leader appointed five members to a Senate Committee on Ethics (Committee) pursuant to Senate Rule 43. The Committee is tasked with making a preliminary investigation of the complaint and, as part of the preliminary investigation, determining if probable cause exists to find that a violation may have occurred. What is the standard for finding probable cause?

Short Answer

Senate Rule 43 does not define "probable cause". "Probable cause" is a standard that is often used in criminal proceedings during a preliminary hearing to determine whether the charges should be dismissed for lack of evidentiary support to proceed to a full hearing. In that context, the probable cause standard "requires evidence sufficient to

¹ This legal memorandum was prepared by the Office of Legislative Legal Services (OLLS), a staff agency of the General Assembly. OLLS legal memoranda do not represent an official legal position of the General Assembly or the State of Colorado and do not bind the members of the General Assembly. They are intended for use in the legislative process and as information to assist the members in the performance of their legislative duties.

induce a person of ordinary prudence and caution to a reasonable belief that the defendant committed the crimes charged."² Applying that standard to the context of a legislative ethics complaint, the Committee should review the evidence to determine if the evidence could support a reasonable belief that an ethics violation was committed.

Discussion

The senate president received a complaint under Senate Rule 43 alleging that: (1) Senator Gardner exerted undue influence on the state court administrator for private gain by calling the state court administrator to get a different judge appointed to a colleague's court case; (2) Senator Gardner had a conflict of interest when he sponsored H.B. 21-1136³ while he was also serving on a committee tasked with hiring an investigator to investigate the judicial branch; and (3) Senator Gardner's sponsorship of H.B. 21-1136 undermined public confidence in the integrity and independence of the senate. The Committee was formed under Senate Rule 43 in response to the complaint.

Senate Rule 43 (d) provides in part:

If, after the preliminary investigation, the committee determines probable cause exists to find that a violation may have occurred, it shall so notify the person complained against.

The preliminary investigation "shall consist of an examination of the complaint, the answer, if any, and any other evidence compiled pursuant to the request of the committee".⁴ The committee, however, shall not receive testimony or evidence from other sources.⁵ If the Committee finds that no violation has occurred, the Committee shall dismiss the complaint.⁶ If probable cause is found after the preliminary

² *People v. Johnson*, 618 P.2d 262, 265 (Colo. 1989).

³ H.B. 21-1136 is entitled "Concerning modifications to the policies governing judicial division retirees returning to temporary judicial duties, and, in connection therewith, making an appropriation." H.B. 21-1136 became effective on May 4, 2021.

⁴ Senate Rule 43 (c).

⁵ *Id.*

⁶ *Id.*

investigation, however, the Committee shall notify the person complained about of the finding and the person complained about may request a hearing on the matter.⁷

1. In a criminal preliminary hearing, the probable cause standard is used as a screening device.

"Probable cause" is a standard in criminal cases, often used in a preliminary hearing to determine if charges should be dismissed or the case should proceed to trial. In that context, the probable cause standard "requires evidence sufficient to induce a person of ordinary prudence and caution to a reasonable belief that the defendant committed the crimes charged."⁸ "Probable cause must be established as to each element of the crime charged."⁹

The probable cause standard "is incapable of precise definition or quantification into percentages".¹⁰ "Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place" in a probable cause determination.¹¹ That said, it is clear that "probable cause is something less than a preponderance".¹² A fact is established by a preponderance of the evidence when, upon considering all of the evidence, the existence of the fact is more probable than its nonexistence.¹³

In a criminal case, "the preliminary hearing is not intended to be a mini-trial ... the 'restricted purpose' of the preliminary hearing 'is to screen out cases in which prosecution is unwarranted by allowing an impartial judge to determine whether there is probable cause to believe that the crime charged may have been committed by the defendant.'"¹⁴ Evidence presented in a criminal preliminary hearing "must be viewed in the light most favorable to the prosecution".¹⁵ The rules of evidence are generally

⁷ Senate Rule 43 (d).

⁸ *Johnson* at 265.

⁹ *People v. Fisher*, 759 P.2d 33, 36 (Colo. 1988).

¹⁰ *Maryland v. Pringle*, 540 U.S. 366, 371 (2003).

¹¹ *Illinois v. Gates*, 462 U.S. 213, 235 (1983).

¹² *United States v. Limares*, 269 F.3d 794, 798 (7th Cir. 2001).

¹³ *People v. Garner*, 806 P.2d 366, 370 (Colo. 1991).

¹⁴ *People v. Brothers*, 2013 CO 31 ¶16.

¹⁵ *Johnson* at 265.

relaxed in a preliminary hearing and hearsay evidence may form a substantial part of the evidence presented.¹⁶ Hearsay evidence refers to testimony or other evidence given by a witness that relates what others have told the witness or what the witness has heard said by others, and not what the witness knows personally.

2. Applying the probable cause standard to the context of a legislative ethics committee, the Committee should determine if the evidence supports a reasonable belief that an ethics violation was committed.

Translating the criminal probable cause standard and the preliminary hearing principles into the context of the Committee's preliminary investigation of the ethics complaint, a common-sense approach for making its determination would be for the Committee to examine the evidence before it – the complaint, the answer, and any evidence compiled pursuant to the Committee's request, but not including testimony – to evaluate whether the evidence would "induce a person of ordinary prudence and caution to a reasonable belief" that the person complained about committed the ethics violation alleged.¹⁷ In conducting the preliminary investigation, the Committee should view whether probable cause can be established for every element of the ethics violation alleged.

Even if the evidence before the Committee might be inadmissible in court, such as hearsay evidence, the Committee could review it as part of the preliminary investigation to determine whether it supports a finding of probable cause of an ethics violation.

Conclusion

Applying the "probable cause" standard to the context of a legislative ethics complaint, the Committee should review the evidence to determine if the evidence could support a reasonable belief that an ethics violation was committed.

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¹⁶ *People in Interest of M.V.*, 742 P.2d 326, 329 (Colo. 1987).

¹⁷ Quoting *Johnson* at 265.